to allow collocation at the time trenches are open, fully satisfies the competitive neutrality standard of Section 253(b) and thus the requirement is saved by this section.

VI. THE STATE'S REQUIREMENT IS SAVED BY SECTION 253(c).

Section 253(c) has many features that are similar to Section 253(b) and some which are unique. First, management of rights-of-way is specifically articulated as a reserved police power over which states retain pre-Act authority. The Act provides that:

> Nothing in this section affects the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers on a competitively neutral and non-discriminatory basis for use of public rights-of-way on a non-discriminatory basis.

Telco Opponents make three basic arguments. First, they believe that selection of an entity with exclusive physical access does not constitute rights-of-way management, either because it creates a third tier of regulation or because it was done with an intent to obtain a private telecommunications system for the State. Second, Telco Opponents argue that even if it is right-of-way management, it is not sufficient to provide non-discriminatory lease rates. Compensation itself must be non-discriminatory and the State cannot delegate its authority under the Act to Developer. Third, entities argue that the agreement is discriminatory because it forces entities to time their investment or lease capacity. Finally, they assert that there is no assurance that rates will be fair and reasonable.[19]

A. The State Requirement Is Well Within The State's Legitimate Exercise Of Its Right-Of-Way Management Function.

Several parties cite Commission precedent including the testimony of Senator Feinstein, as the basis for arguing that the State's agreement is not related to right-of-way management

> These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement

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[19] See Comments of USTA, et al

> of building codes, and keeping track of the various systems using the rights-of-way to prevent interference with them.
>
> TCI Cablevision of Oakdale County, Inc., Petition for Declaratory Relief, Memorandum and Opinion and Order, CSR-4790; FCC 97-331 (released September 19, 1997) ("TCI") at para. 103.

Senator Feinstein identified several rights-of-way management objectives including the requirement to regulate the time and location of excavation to preserve effective traffic flow, prevent hazardous conditions, or minimize notice impacts. Id.

The central issue in this case is whether or not the State can exercise its discretion regarding the timing of and manner in which entry on its rights-of-way occurs. The indisputable answer is that these are both rights-of-way management functions as they do precisely what Senator Feinstein hoped would be preserved and what the Commission has recognized as preserved by Section 253(c). As discussed in detail in Section V.A, construction activity on freeway rights of way will create increased safety and convenience risks to the traveling public. If minimizing these risks is not a rights-of-way management function, then the State is at a loss for what would constitute rights-of-way management. If a complete ban on access is a legitimate rights-of-way management policy, as the previous FHWA prohibition clearly was, so is a policy which restricts construction to a one-time placement by a single construction entity for a period of ten years. Utilizing a single entity and requiring that collocation occur at the time the trench is open is the State's way of assuring coordination of construction schedules so as to minimize hazards to the public safety and convenience.

Section 253(c) also allows for consideration of the impacts of increased traffic congestion, and other factors affecting the convenience of the traveling public. One time entry, particularly in urban areas will minimize the number of times already congested freeways will experience lane closures which lead to further delays and subsequent economic loss. Petition (Affidavit of Lari); Exhibit 2 (Durgin Rebuttal Affidavit).

Telco Opponents argue that because the State was bartering for fiber capacity, its actions do not fall within the scope of legitimate rights-of-way management under Section 253(c). MTA Opposition, p.53. The fact that the State decided to obtain fair compensation for use of its rights-of-way is not evidence that the State's action was not based on sound freeway rights-of-way management. The freeway system is unique and requires a different management approach than other roadways. The State has provided substantial evidence that its proposed restriction is a legitimate rights-of-way management function.

B. The State Has Not Improperly Delegated Its Right-Of-Way Management Authority.

Telco Opponents argue that by granting Developer exclusive physical access to the freeway rights-of-way the State has delegated its right-of-way management authority. Nothing could be further from the truth. It is precisely because the State wishes to remain in strict control over its ability to manage freeway rights-of-way that it is allowing only a single entity access. It is also the reason that the Agreement is replete with restrictions on Developer's entry rights. Some parties argued that State's insistence on tight restrictions was a sufficiently stringent retention of its right-of-way management authority such that the same restrictions could be applied to allow other entities physical access. However, the decision of how to best manage the public safety and convenience issues involved are reserved to the State, not Telco Opponents. As has been demonstrated, the State has legitimate concerns regarding the frequency with which construction activity should take place. In the context of Section 253(c), that reasonable exercise of judgment need not be "necessary" to promote public safety and convenience. Rather, as long as the competitive neutrality and non-discrimination requirements are met, the requirement need only be a reasonable exercise of the State's pre-Act authority to manage the rights-of-way. Requiring a one-time development for a ten-year period reduces the construction activity while still allowing multiple entities to deploy fiber in the freeway rights-of-way. Clearly, this is an exercise of reasoned judgment in departing from a policy which banned longitudinal placements in Minnesota for the past 40 years.

Some parties argued that an improper delegation occurs when the Developer charges collocators and other telecommunications companies for the compensation Developer paid to the State.

First, the State does not agree that any delegation actually occurred. Developer paid fair and reasonable compensation. It will attempt, without any guarantee, to recover its costs from others. The compensation paid is from the single entity selected to construct facilities and is thus competitively neutral and non-discriminatory as the compensation was derived from a competitive procurement for which all entities had an opportunity to respond. No party has explained how this result is different from an entity that pays a permit fee to install fiber attempting to recover the cost of the permit fee when it decides to lease facilities. The response to the RFP determines the appropriate level of compensation. Developer will pay this and no further delegation has occurred. The State imposed the non-discrimination requirements, in large measure, as a policy choice that assured consistency with the Telecom Act for these unique circumstances.

However, to the extent delegation has occurred, it certainly was not impermissible. The Agreement assures that the Developer will establish non-discriminatory rates such that the policy objective of the Act is fulfilled. Nothing in the Act prohibits the State from selecting a management entity to manage fiber construction in its rights-of-way much like MFS does on behalf of the New York Thruway Department.

USTA, et al. assert that there is no protection that Developer will charge fair and reasonable rates. First, Developer is under no such duty. The State must charge fair and reasonable compensation under Section 253(c). The procurement established fair and reasonable compensation for development of rights-of-way that involve substantial risk to the State. Second, parties cannot seriously argue that Developer will automatically recoup this compensation in its costs due to market power for the reason discussed in Section IV. If this were true, Developer would not have spent two years negotiating an Agreement but rather simply offered whatever it

took, knowing that it was assured recovery. Because of competitive market conditions, both collocators and entities purchasing or leasing capacity will obtain fair and reasonable rates.

As discussed in Section V, the RFP process assures competitively neutral and non-discriminatory compensation. See also Exhibit 4 (Pearce Rebuttal Affidavit). MTA argues that an RFP process cannot meet the requirements of competitive neutrality under Section 253(c). MTA noted that a city, such as Bogue and Hill City, could use an RFP process to grant exclusive access to public streets to a single entity subject only to the requirement that it have to resell capacity to LECs or CLECs at non-discriminatory rates.

This example skips over the overriding salient facts in this entire debate. First, unlike municipal streets, freeway rights-of-way are not the only alternatives for placement of wireline facilities. The Petition and Section IV provides a detailed analysis of market conditions and options that no municipality could replicate. Second, unlike previously utilized rights-of-way for which a city attempts to create a new restriction, the State here is removing the most restrictive condition on its freeway rights-of-way (that being no access whatsoever). Both the policy of no access and of exclusive physical access are justified by legitimate rights-of-way management considerations. Finally, the city would also need to provide the ability of other entities to collocate facilities when the trench was open subjecting the entrant to face-to-face competition--the precise activity that Bogue and Hill City attempted to prevent. The analogy does nothing to refute the legitimacy of the RFP process as a competitively neutral and non-discriminatory means of setting compensation.

C. Non-Discriminatory Use Of The Right-Of-Way Is Provided For.

Because the State allows for collocation at non-discriminatory rates and charges, there is non-discriminatory use of the right-of-way. Developer cannot pick and choose entities for which it desires to have collocated. Rather, it must serve all comers. The fact that some entities cannot time their investment to collocate is a function of the state requirement to open the trench once to minimize disruption and protect the safety and convenience of the traveling public. Even so,

these entities will be able to purchase dark fiber on a non-discriminatory basis or if they desire to lease lit capacity. As long as all entities that are willing and able to collocate, purchase or lease facilities are permitted this opportunity, there is no discrimination in the use of the rights-of-way.

D. Section 253(c) Should Be Considered As A Savings Clause To 253(a).

ALTS and USWC urge the Commission to find that there need not be a violation of 253(a) to find that there is a violation of 253(c). Although the State recognizes that the FCC cannot pre-empt State action under Section 253(c), it can interpret the section. The Commission should reaffirm that Sections 253(b) and (c) act as savings clauses for violations of Section 253(a) and that there is no independent basis by which a violation of Sections 253(b) and (c) would occur absent a violation of Section 253(a). Further, the Commission should interpret the requirements of 253(c) as stated above. It should apply the concepts of non-discrimination and competitive neutrality to the specific facts and find that the State requirement satisfies the provisions of Section 253(c) given the unique circumstances involved.

Finally, the State agrees with the Commission in Classic that:

> Congress envisioned that in the ordinary case states and localities would enforce the public interest goals delineated in Section 253(b) through means other than absolute prohibitions on entry.

Classic, para. 38. As has been made abundantly clear, freeways and their rights-of-way are not the ordinary case. The Commission should take heed of the significant factual and historical differences that have led states to make unique decisions regarding freeways that can be easily distinguished from other rights of way decisions. In doing so, it should determine whether, under the specific facts presented, the action will contribute to competition or cause it harm. To the extent that rights-of-way restrictions are necessary to open additional rights-of-way for development and these rights of way are available to multiple entities, as is the case here, the Commission should interpret Section 253(c) to promote the pro-competitive goals of the Act, recognizing that the most pro-competitive option argued for by Telco Opponents simply will not occur.

VII. REPLY TO MISCELLANEOUS ARGUMENTS.

A. Section 253 Does Not Apply To This Agreement.

The Telco Opponents all argued that Section 253 is applicable to the Agreement. For the reasons stated in its Petition, the State believes that Congress was concerned about provision of service to the public. A carrier's carrier does not impact such service provision but acts as a conduit to it. As long as it is obligated to serve all comers, it cannot have the effect of prohibiting the offering of telecommunications services. Further, the State's contracting authority does not necessarily implicate Section 253. Unlike Huntington Park, here, the State utilized a competitive procurement for fiber connecting 17 MnDOT offices. This is ordinary state business which does not invoke Section 253 review. The State concedes that certain Commission precedents have taken a more expansive reading of the Act. Nonetheless, the State continues to believe that Section 253 does not apply.

B. State Law Concerns Are Not At Issue.

MTA and MFS both raise state law questions which are not at issue and which should not concern the Commission:

The first involves Minn. Stat. § 16B.465, which requires the Department of Administration to make available telecommunications services to its political subdivisions, including counties, cities, school districts, public colleges and universities, public corporations (which are formed solely for governmental purposes. See Minn. Stat. § 300.02, subd. 7) and private colleges and universities.

The MTA provides a policy argument as to why the State should not serve as a central purchasing agent for these entities telecommunication needs. However, this is an internal state business operational issue left to state and local authorities as was the case in PUC of Texas. There, the Commission did not preempt the State of Texas from prohibiting its municipalities from offering telephone service. Here, the State can choose to serve or not serve the needs of its political subdivisions without running the risks of federal preemption. Moreover, the statute

involved does not require entities to purchase telecommunications services from the State. Finally, to the extent this statute somehow runs afoul of Section 253, it is the statute and not the Agreement which should be challenged. No party has challenged or sought preemption of Minn. Stat. § 16B.465 and thus, the issue is not before the Commission.

MFS argues that the State Utility Accommodation Policy and Minn. Stat. § 237.163 require the State to allow multiple entrants onto its freeway. The Utility Accommodation policy does allow for longitudinal placement in unusual circumstances under tightly supervised conditions. To date this has been utilized to permit utility crossings placed perpendicular to the freeway rights-of-ways and to fulfill a legislative mandate to open one stretch of freeway to development. The State has complete authority under its policy to refuse entities access. The Utility Accommodation Policy does not contemplate a traditional permit process for freeway rights-of-way with multiple entrants engaging in construction activity at regular intervals. The Agreement, which allows for a one-time development of these rights-of-way, is consistent with the policy.

Minn. Stat. § 237.163 is cited for the proposition that it is in the public interest for public rights-of-way to accommodate telecommunications utility placement. However, MFS ignores the terms of this section apply only to the rights-of-way of local governments and not state government.[20] As such, MFS has no state law rights which should concern the Commission.

[20] In fact, an earlier version of this bill included in the definition of public rights-of-way, State trunk highways and state freeways. The language was removed before the passage by the House Regulated Industries Committee. Thus, the committees that dealt directly with telecommunications and rights-of-way issues were aware of the project and passed a version of § 237.163 which allowed the State to pursue the current agreement.

VIII. THE COMMISSION SHOULD DECLARE THAT THE AGREEMENT IS CONSISTENT WITH SECTION 253 OF THE TELECOM ACT.

Based on the foregoing arguments, the State of Minnesota requests that the Commission declare that the Agreement is consistent with Section 253(a), (b) and (c) of the Telecommunications Act of 1996. Specifically the Commission should declare that:

- The grant of exclusive physical access to a single entity for the purposes of installing fiber optic cable of its own and others is not a per se violation of Sections 253(a), (b) or (c).

- Where the existing product market is already competitive and there are cost-effective alternative rights-of-way for placement of telecommunications facilities competing in relevant market, grant of exclusive physical access to freeway rights-of-way to a single entity does not violate Section 253(a), particularly when multiple entities are permitted to have facilities installed for their use.

- Limiting the frequency with which freeway rights-of-way will be opened for longitudinal placement of fiber optic cable is a legitimate exercise of State's authority to protect public safety pursuant to Section 253(b).

- Limiting the manner in which construction and maintenance of longitudinal fiber optic cable on freeway rights-of-way occurs, by requiring a single construction and maintenance entity is a legitimate exercise of the State's authority to protect public safety pursuant to Section 253(b).

- Restricting construction of fiber optic cable on freeway rights-of-way to a single placement opportunity through a single construction entity is necessary to protect public safety under Section 253(b).

- Where a single entity is deleted through the use of an objective state procurement process to construct and maintain fiber optic cable on freeway rights-of-way and the single placement opportunity accommodates fiber of multiple providers, the competitive neutrality requirement of Section 253(b) is satisfied.

- States are under no obligation to open their freeway rights-of-way for accommodation of longitudinal placement of fiber optic cable pursuant to Section 253(c).

- Limiting the frequency with which freeway rights-of-way will be opened for longitudinal placement of fiber optic cable is a legitimate exercise of state rights-of-way management authority pursuant, to Section 253(c).

- Limiting the manner in which construction and maintenance of longitudinal fiber optic cable on freeway rights-of-way occurs, by requiring a single construction and maintenance entity is a legitimate exercise of the State's right-of-way management authority pursuant to Section 253(c).

- Once a state decides to open its freeway rights-of-way for development, the decision on how often the rights-of-way need be open, including the option not to reopen the freeway rights-of-way, is a decision reserved to the reasonable judgment of the state, provided that when the right-of-way is opened, multiple carriers may install fiber.

- When a state selects a single entity to install and maintain fiber on freeway rights-of-way, a state may determine fair and reasonable compensation through a competitively neutral procurement process.

IX. THERE ARE NO GROUNDS FOR PREEMPTION.

Several Telco Opponents not only requested that the Commission deny the State's request for a Declaratory Ruling, but also asked the Commission to preempt the Agreement pursuant to Section 254(d) authority.

The Commission should not preempt the State's action for all of the reasons stated herein. Specifically, there has been no factual showing of a material impairment to a fair and balanced legal and regulatory environment. The facts clearly support the view that the fiber wholesale market is extremely competitive and Developer will obtain no significant or material cost advantage so as to so severely skew the market to an extent that warrants preemption.

Further, Sections 253(b) and (c) are savings clauses and without a violation of Section 253(a) there is no basis to preempt the State law under Section 253(b).

Finally, the Commission lacks authority to preempt the Agreement. Rights-of-way management authority are reserved to the states and Section 254 does not grant the Commission authority to preempt the Agreement which is fundamentally a concern over the appropriateness of the State's management of its freeway rights-of-way. As such, the Commission should not preempt the Agreement nor does it have the requisite authority to do so.

X. CONCLUSION.

The State has demonstrated that the opposition in this case cannot be realistically concerned about any anti-competitive aspects of the Agreement. Developer will operate in a market where many of the opponents currently have fiber networks in place. Developer will face continued entry by others via alternative rights-of-way. Existing fiber capacity will expand exponentially as technology develops. There is absolutely no competitive harm.

This is a case about freeways -- not municipal streets. While CLECs and ILECs certainly have expressed legitimate concerns to the Commission in other proceedings regarding municipal franchising decisions and how they are affected by rights-of-way management, this case does not present any of those issues. There is no franchise on freeways. They are unlike municipal streets, where there are no alternatives for most point-to-point placements of wireline facilities. Rather, there are multiple alternative rights-of-way to reach the various locations along freeways. The Commission should make its decision based upon the unique facts surrounding freeway rights-of-way. A review of the evidence regarding existing and planned fiber facilities, and the availability of alternatives, makes it clear that the Agreement does not have the effect of prohibiting entities from offering telecommunications services.

Freeway rights-of-way are not only unique from a market perspective but also from a safety and convenience perspective. Freeways carry high volumes of traffic in many areas and always at high speeds. They are among our safest roadways and minimizing disruptions to protect the safety and convenience of the traveling public has historically and is still today the primary concern of all managers of these freeways and their rights-of-way. This difference has led to different rights-of-way management strategies, including a 30-year FHWA prohibition against longitudinal utility placements.

When these unique facts are carefully reviewed, it is apparent that the State's decision to allow a single placement opportunity by a single construction entity for a period of ten years is a legitimate exercise of the powers reserved to the State under Sections 253(b) and (c). The requirement of Developer to serve all entities requesting to collocate facilities, purchase dark

fiber or lease lit fiber assures competitive neutrality by assuring that all firms that want to place fiber during construction may do so. In addition, it satisfies the requirement that the State allow non-discriminatory use of the freeway rights-of-way.

The State has embarked upon a strategy to facilitate the development of the information super highway. However, the State can only to do so by assuring that its vehicular super highways remain relatively undisturbed. In balancing these competing objectives, the State negotiated an Agreement which is consistent with Section 253 of the Telecom Act. The Commission should remove the cloud cast on this project and allow for development of freeway rights-of-way for telecommunications purposes by declaring that the Agreement is consistent with Sections 253(a), (b) and (c).

Dated: April 9, 1998

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

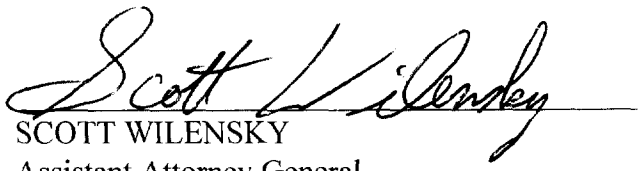

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EXHIBIT 1

REBUTTAL AFFIDAVIT

OF JAMES N. DENN

I, James N. Denn, state the following under oath:

1. I am the Commissioner of the Minnesota Department of Transportation (Mn/DOT). I was appointed Mn/DOT's Commissioner in November 1991. I am responsible for, and make the final decisions regarding, the safety and convenience of the traveling public on Minnesota roadways.

2. I am a member of the Executive Committee and the Board of Directors of the American Association of State Highway and Transportation Officials (AASHTO), and am president of AASHTO's Mississippi Valley Conference. I am actively involved with the National Research Council's Transportation Research Board (TRB) and served on the TRB Executive Committee, Subcommittee for NRC Oversight and the Research and Technology Coordinating Council. I serve on the Minnesota Guidestar Board of Directors and previously served as co-chair of its Executive Committee. I am a member of the Minnesota Environmental Quality Board; the University of Minnesota Center for Transportation Studies Executive Committee; and the Board of the Minnesota Safety Council.

3. Longitudinal placement of fiber optic cable in the freeway right-of-way directly raises issues concerning safety of transportation and utility workers as well as safety of the traveling public.

4. In fulfilling my constitutional and statutory duties as Commissioner of Transportation, I rely on the advice of engineers and other professional staff whose training, experience and responsibilities pertain to the safe and efficient operation of Minnesota's highway system including freeways. However, I am charged with making the ultimate decisions on use of highway right-of-way.

5. I believe that the safest approach for longitudinal fiber optics accommodation is to assure that construction occurs only at one time. This approach limits frequency of freeway right-of-way access to a single installation by a single entity. We have safeguarded opportunity rights of any telecommunications entity that wishes to have cable placed in the same freeway right-of-way. The single entity provides a channel through which collocation of fiber optics cable can occur in the freeway right-of-way.

6. During construction on a roadway right-of-way which is undertaken while traffic is using the roadway, there is a significant threat of harm to the construction workers, inspectors, and to the traveling public. The only way Mn/DOT will allow longitudinal utility installation on its freeway right-of-way is to have a single time/single construction entity installation. If multiple placements either via a permit process or by multiple contractors during an "open season" is required in order to allow fiber deployment on the freeway, an unacceptable level of safety risk will exist which I will not tolerate.

7. The safety benefits of having a single time/single contractor on the freeway right-of-way for accommodation for fiber optics outweighs any other option. The only other option is to deny access for any fiber placement in the freeway right-of-way. If the state is precluded from allowing a single contractor/single time, then no contractor access will be allowed longitudinal freeway right-of-way access for fiber optics accommodation.

8. Those who oppose this project and who summarily dismiss the state's concerns are not charged with right-of-way management decisions and do not have the constitutional and statutory responsibility for maintaining the public safety of Minnesota's highway system. The state's judgment on this right-of-way management issue should be respected where there is a clear showing that the safety concern is legitimate and not a sham or red herring.

9. Each state must decide, given their respective jurisdictions and concerns, how to carry out such a decision. Minnesota freeways are among the safest in the country. As the Commissioner of Transportation, I will not tolerate or accept any degradation of this safety. Therefore, this project must be carried out with limits--only one utility installation in the freeway

right-of-way using a single contractor. We see no other alternative. Given our overriding and demonstrated concern for public safety this approach is tantamount and reserved to those charged with state freeway management.

10. I encourage the FCC in making its decision as to this important issue to put itself in the shoes of state highway officials and engineers who are charged with ensuring the safety of the traveling public and of transportation workers while at the same time providing a reasonable accommodation for projects such as this.

FURTHER YOUR AFFIANT SAYETH NOT:

Dated: 4.8.98

James N. Denn

Commissioner

Subscribed and sworn to before me this

8th day of April, 1998

MARY HELBACH
NOTARY PUBLIC - MINNESOTA
WASHINGTON COUNTY
My Commission Expires Jan. 31, 2000

NOTARY PUBLIC

EXHIBIT 2

REBUTTAL AFFIDAVIT
OF DARRYL E. DURGIN, P.E.

I, **Darryl Durgin**, state the following under oath and on information and belief:

1. I am a licensed professional engineer in the State of Minnesota and the Deputy Commissioner/Chief Engineer for the Bureau of Engineering and Operations with the Minnesota Department of Transportation (Mn/DOT). I was appointed to this position in December 1991. As Deputy Commissioner/Chief Engineer, I possess the same powers as the Commissioner of Transportation. Among my responsibilities as Deputy Commissioner/Chief Engineer is advising Mn/DOT's Commissioner on highway management issues. I am charged with maintaining safety for the traveling public and transportation workers as it relates to highway/freeway right-of-way.

2. I have served for 38 years at Mn/DOT in various professional engineering and management positions. including Assistant Commissioner for Program Management Division; Deputy Division Director for the Operations Division; District Engineer for the Brainerd District in Brainerd, Minnesota; and County Engineer for Kittson County in Minnesota.

3. I actively participate in the American Association of State Highway and Transportation Officials (AASHTO) as a member of the National Designated Chief Highway Engineers Group, and as Minnesota's representative on the Standing Committee on Highways. I am a member of the National Society of Professional Engineers (NSPE) and Minnesota Society of Professional Engineers (MSPE); a member of the Minnesota Surveyors & Engineers Society (MSES); Co-Chair of the Minnesota Guidestar Board of Directors; and a member of the Advisory Board for the University of Minnesota's Center for Transportation Studies.

4. In the 1950's, with the advent of the National System of Interstate and Defense Highways, the federal government emphasized safety and increased highway system capacity by controlling right-of-way access points and by limiting the use of freeway rights of way. Access to freeways was allowed only at designated interchange locations and no nonvehicular use of the right of way was permitted.

5. In 1959, the American Association of State Highway Officials (AASHO), now known as the American Association of State Highway and Transportation Officials (AASHTO), adopted "A Policy on the Accommodation of Utilities on the National System of Interstate and Defense Highways." This policy was created to: (1) develop and maintain access control; (2) increase highway safety and function to the maximum; and (3) ensure uniformity of utility treatment among the states. This policy was accepted by the Bureau of Public Roads (BPR), now known as the Federal Highway Administration of the U.S. Department of Transportation (FHWA), as a design standard for utility accommodation. (See Williams, Ronald L., Longitudinal Occupancy of Controlled Access Right-of-Way by Utilities, National Cooperative Highway Research Program, 1996 for a comprehensive historical overview of placement of utilities on freeway right-of-way).

6. Since 1959, federal regulations prohibited longitudinal freeway right-of-way use for utility installations unless a special hardship circumstance warranted an exception. The basis for restricting longitudinal freeway right-of-way access to utilities was due to design, safety, and operational differences between freeways and trunk highways. Only the Federal Highway Administration of the U.S. Department of Transportation (FHWA) could grant an exception for extreme hardship. Hardship was proven where the utility installation was extraordinarily difficult or expensive for the utility to use other alternatives. Very few hardship requests were ever approved.

7. In February 1988, the FHWA amended its utility accommodation regulations. This amendment revised the FHWA's ban of prohibiting placement of

utilities on longitudinal freeway right-of-way. This policy also no longer required states to follow the AASHTO utility accommodation policy. Rather, the FHWA delegated to the states the responsibility for creating their own policies and regulations regarding utility installations on freeway right-of-way. The FHWA did reserve its authority to review and approve all state freeway utility accommodation policies. The FHWA charged the states with determining its appropriate safety, construction procedures, and maintenance requirements. As a part of its new policy, the FHWA requires that states' utility policies ensure the safety of the traveling public and protection of freeway integrity. FHWA regulation 23 C.F.R. 645.209(c)(2). States are expressly required to consider the effects utility installations will have on highway and traffic safety. In no case shall any use of the freeway be permitted which would adversely affect safety.

8. In 1989, AASHTO responded to the new FHWA utility accommodation policy by revising its utility accommodation policy to conform with the FHWA. The AASHTO policy, Policy Resolution PR-21-95, adopted on October 29, 1995, acknowledges the distinction between buried fiber optic cables and other types of utilities, and deems permissible the longitudinal use of freeway right-of-way for fiber optic cables under appropriate guidelines. However, AASHTO policy continues to oppose the longitudinal use of freeway right-of-way for other utility types.

9. AASHTO Policy Resolution PR-21-95 does not support unlimited longitudinal freeway access by multiple contractors. The Resolution recognizes the state's obligation to weigh safety, construction and maintenance concerns in determining how each state will permit longitudinal placement of fiber along freeway right-of-way.

10. In 1989, even after the FHWA rescinded its ban on longitudinal placement of utilities in freeway right-of-way, Mn/DOT continued its policy of limiting longitudinal utility access along freeway right-of-way because of public safety and convenience concerns. In 1990, the State reluctantly granted access to AT&T for longitudinal

placement of fiber on freeway right-of-way along a limited stretch of one Minnesota freeway after the legislature mandated that Mn/DOT allow such placement.

11. The Mn/DOT Procedures for Accommodation of Utilities on Highway Right of Way, dated June 27 1990, (Accommodation Policy) describes the conditions applicable to permits for placement of utilities on highway rights-of-way. The MnDOT policy is consistent with the 1989 AASHTO Utility Accommodation policy and it covers longitudinal placement of fiber optic cable on freeway right-of-way. The policy distinguishes between freeway and nonfreeway utility placement. However, the policy does not confer a right of access to the freeway by a utility owner or installer and it has never been applied by or against MnDOT as conferring such a right of access. Except as indicated in paragraph 10 above, under this Accommodation Policy, MnDOT has never permitted any utility longitudinal access to a Minnesota freeway. The Accommodation Policy, Section VI, (A) (1), provides foremost among the conditions which must be met by any user of the right-of-way that "The accommodation will not adversely affect traffic safety, design, construction, operation capacity, maintenance, stability or interference with the present or future use of the freeway." Furthermore, Section VI (B) reserves to MnDOT the right to require that any installation be placed in multi-use ducts.

12. Minnesota's freeways are among the safest in the nation. Based on the United States Department of Transportation, FHWA, Highway Statistics 1996, PL-98-003, (Attachment A) Minnesota's rural fatality crash rate on freeways is 67% below the national average and approximately 77% below the fatality rate for the national highway system.

13. Mn/DOT is addressing safety and operational concerns for the traveling public and transportation and utility workers arising out of providing freeway right of way for installation of fiber cable. The placement of fiber along freeways increases vehicles in the right-of-way during fiber installation and maintenance, increases traffic congestion, and inconveniences motorists.

14. Freeways are unique roadways. Freeways handle high traffic volumes at high speeds and are designed with fully controlled access and less frequent interchanges, grade separations at intersections, broader clear zones to maintain visibility and recovery of the errant vehicles and recovery zones for emergency vehicles, broader shoulders and ditches, fencing, and other design elements which accommodate safety for high traffic volume and speed. Based on the different nature, design, and use of freeways, the safety considerations for them are more rigorous than for other roadways.

15. Mn/DOT originally purchased its freeway right-of-way solely for vehicular use. The freeway was designed only for use of the motoring public. Utility installations or accommodations were not considered when purchasing right-of-way or designing the roadway. Thus, utility installation requires an accommodation as an unintended addition to an existing facility which has as its primary purpose providing a safe environment for its travelers and workers.

16. Every maintenance or construction activity on a roadway creates a distraction for the motorist. On a freeway with more vehicles traveling at higher speeds, it is absolutely essential to limit the number and frequency of distractions. A distracted motorist is less safe than a motorist who is not distracted.

17. Based on statistics compiled and maintained by the Minnesota Department of Public Safety and reproduced by MnDOT (Attachment B), in the last five years there have been more than 11,000 street and highway work zone crashes in Minnesota. This figure includes crashes reported in construction, maintenance and utility work zones. Work zone crashes have resulted in more than 5,500 injuries to workers, pedestrians and motorists. Work zone accidents have also killed 64 people, 63 of whom were travelers. In addition to the fatalities and injuries in this time period, there were 7,803 property damage accidents. Overall, it is estimated that fatalities, injuries and property loss resulting from work zone traffic crashes amounted to $221,429,100 in loss. Even when appropriate safety standards are in place, e.g., lane closures, work zone accidents occur.

18. Even if lane closure policies are invoked for utility installation purposes, motorists, and transportation and utility workers still face risks. While lane closures may help to diminish accidents, they do not eliminate accidents. Crashes recorded by the Minnesota Department of Public Safety indicate that during the period January 1, 1992 through December 31, 1997, there were 846 utility work zone crashes and 10,520 construction work zone crashes. (Attachment B).

19. As seen in the attached photograph (Attachment C) taken from Traffic Technology International, Annual Review 1998, p.42, where fiber optic placement takes place on the right-of-way, traffic disruption still occurs. This photograph which depicts actual installation of fiber optic cable on a New York freeway right-of-way is indicative of the type of equipment used and construction activity which will occur for installation of fiber optic cable. Lane closures do not eliminate safety risks, and should not be viewed as a safety panacea. Lane closures slow traffic, increase congestion, and do not eliminate the underlying distraction from the motorists' attention.

20. Multiple fiber installation projects on MnDOT freeways occurring over a period of time exacerbates MnDOT's safety concerns. Additional installation projects by multiple entities will create a proportional increase in exposure to risk of accidents and that risk to lives and property will be spread over a longer period of time. The construction and maintenance of utilities such as telecommunication equipment located in freeway rights-of-way distract drivers and cause traffic disruptions. If multiple telecommunications installations were permitted there will be a commensurate increase the number of pieces of equipment and personnel both during construction and in the event of maintenance. The additional workers, vehicles and equipment operating at the various locations in typically high-traffic volume environments will definitely result in vehicle slow downs and speed disparities, which in turn increase accident probability. Even where traffic in the opposite lanes of travel is not affected by lane closures, the

effect of "gawker slowdown" in those lanes will disrupt traffic, create speed disparities, and increase the threat to the traveling public.

21. The public safety problems described in paragraph 20 are amplified where there are multiple entities on the right-of-way each installing their own fiber optic cable. In addition to increasing the risks due to greater frequency of work being done on the freeway, having more entities' equipment and crews doing the work multiplies the public's exposure to risk. Public safety necessitates that the entities performing the work be kept at a minimum regardless of who owns or uses the fiber optic cable.

22. A less obvious but equally serious problem is the people and equipment on the freeway required to operate and maintain the telecommunications infrastructure once it is in place. Maintenance and operations, unlike construction, are typically reactive in nature and are generally undertaken on an unscheduled basis with minimal planning. This results in a higher risk of exposing motorists, utility workers and MnDOT inspectors to accidents. The likelihood and frequency of such events increases proportionately with each additional installation on the right-of-way. Because of the nature of the utility, when fiber-optic cable is cut, immediate repair is required. If multiple entities are effected by the cut and all were allowed access for their respective maintenance work, there will be additional vehicles and even greater distraction. In addition, the urgency to resume service creates pressure to reduce or ignore safety precautions with the increased likelihood that safety will be compromised.

23. It is Mn/DOT's goal to minimize the frequency of construction and maintenance operations on its freeways which would occur with multiple installations over an unlimited period of time. I have concluded that restricting freeway access to a single utility contractor during construction and maintenance greatly reduces the potential for traffic accidents, fatalities and property damage involving the driving public and transportation and utility workers as well as emergency personnel such as the Minnesota State Patrol.

24. Mn/DOT can balance the interests of granting freeway access to install and maintain fiber optic cable while at the same time maintaining safety and operational standards only by allowing a single time placement for a sufficient period and where construction is limited to a single contractor to longitudinally lay fiber on the freeway right-of-way.

25. In my professional opinion, where fiber installation takes place on a large scale project such as this, a single longitudinal fiber optics contractor rather than multiple contractors allows Mn/DOT to satisfactorily coordinate and monitor construction and maintenance activities. I have advised the Minnesota Commissioner of Transportation on this matter consistent with the statements herein.

26. Minnesota has weighed numerous options, including utilizing a restrictive permit process and allowing multiple entrants on the right-of-way at the same time--also known as an "open season." Because of the reasons expressed above, such options do not significantly resolve safety concerns created by the multiplicity of people and places where work would be conducted over an undetermined period of time. A single installation and maintenance contractor is Mn/DOT's only responsible option compared with any other approach, including permit or multiple entrants on the right of way during an "open season."

FURTHER YOUR AFFIANT SAYETH ~~NOT~~.

Dated: 4/8/98

Darryl E. Durgin, P.E.

Subscribed and sworn to before me this

8th day of April 1998

NOTARY PUBLIC

MARY HELBACH
NOTARY PUBLIC - MINNESOTA
WASHINGTON COUNTY
My Commission Expires Jan. 31, 2000